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SAMSURI BAHARUDDIN & ORS v. MOHAMED AZAHARI MATIASIN & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
AHMAD MAAROP FCJ
B HASAN LAH FCJ
ABU SAMAH NORDIN FCJ
AZIAH ALI JCA
[CIVIL APPEALS NO: 02(f)-34-04-2014(S) & 02(f)-35-04-2014(S)]
19 JANUARY 2017

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LEGAL PROFESSION: *Admission – Ad hoc – Arbitration in Sabah – Foreign lawyer appointed as counsel in arbitration proceedings – Whether foreign lawyers who are not advocates within meaning of Advocates Ordinance 1953 ('Ordinance') prohibited from representing parties in arbitration proceedings in Sabah – Whether*
D *Ordinance applicable to arbitration proceedings in Sabah – Whether advocates admitted in Sabah have exclusive right to represent parties in arbitration proceedings in Sabah – Whether s. 8(1) read together with s. 2(1)(a) and (b) of Ordinance confer to Sabah advocates exclusivity of right to practise by representing and appearing for any party in arbitration proceedings in Sabah*

E ***STATUTORY INTERPRETATION:*** *Definition – 'To practise in Sabah' – Advocates Ordinance 1953, ss. 2(1)(a) and (b) & 8(1) – Whether s. 8(1) must be read together with s. 2(1)(a) and (b) – Whether confer to Sabah advocates exclusivity of right to practise by representing and appearing for any party in arbitration proceedings in Sabah*

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One Samsuri Baharuddin and 813 others ('the claimants') had entered into a joint venture agreement with Borneo Samudera Sdn Bhd ('BSSB') and when things went awry, the parties decided to settle the dispute through an arbitration in Sabah. During the course of arbitration, the claimants argued that counsel appointed by BSSB was required to obtain an *ad hoc* admission
G to the Sabah Bar if he wished to appear at the arbitration. An application was made at the High Court by Mohd Azahari, an advocate and solicitor, for a declaration that (i) foreign lawyers who are advocates within the meaning of the Advocates Ordinance 1953 ('the Ordinance') are not prohibited from representing parties to arbitration proceedings in Sabah; and (ii) the
H Ordinance has no application to arbitration proceedings in Sabah. The High Court Judge held that foreign lawyers who were not advocates within the meaning of the Ordinance were prohibited from representing parties to arbitration proceedings in Sabah. Mohd Azahari appealed against the decision of the High Court to the Court of Appeal and the appeal was
I allowed. The Court of Appeal held that advocates admitted in Sabah have

no exclusive right to represent parties at arbitration proceedings in Sabah. Hence, the present appeals. The issue that arose for adjudication was whether s. 8(1) read together with s. 2(1)(a) and (b) of the Ordinance confer exclusivity of right to practise by representing and appearing for any party in arbitration proceedings in Sabah to Sabah advocates notwithstanding that barristers and solicitors in England do not have the exclusive right of representation in arbitration proceedings.

Held (allowing appeals; setting aside decision of Court of Appeal)
Per Hasan Lah FCJ delivering the judgment of the court:

(1) Representation of parties in arbitration in England was never the exclusive domain of barristers and solicitors in England. Section 36 of the English Arbitration Act 1996 was a codification of the common law position. The Court of Appeal erred by not reading s. 2(1)(a) and (b) together with s. 8(1) of the Ordinance and in tying the non-exclusive right of barristers and solicitors in England to appear for parties in arbitration proceedings with the practise in Sabah as there is an express statutory provision in the Ordinance to the contrary. (paras 30 & 36)

(2) The exclusive right to practise in Sabah is conferred on Sabah advocates by s. 8(1) of the Ordinance. As such, s. 8(1) has to be read with s. 2(1)(a) and (b) of the Ordinance. Section 2(1)(a) and (b) does not create any substantive right. Section 2(1)(a) and (b) merely defines the phrase 'to practise in Sabah' which appears in the first limb of s. 8(1) of the Ordinance to mean to perform any of the functions that may be performed by the barristers and solicitors in England regardless of whether those functions are exclusive or non-exclusive. Exclusivity or non-exclusivity are two separate issues. Exclusivity does not, in itself, form part of the function to be performed. (paras 33 & 34)

(3) By virtue of the first limb of s. 8(1) of the Ordinance, the Sabah advocates have exclusive right to represent a party in arbitration proceedings in Sabah. This statutory right given to the Sabah advocates could not be taken away by relying merely on the fact that barristers and solicitors in England have non-exclusive right to appear for parties in arbitration proceedings, which should form part of the functions included in the expression phrase 'to practise in Sabah'. Therefore, foreign lawyers who are not advocates within the meaning of the Ordinance are prohibited from representing parties to arbitration proceedings in Sabah. (para 35)

Bahasa Malaysia *Headnotes*

Samsuri Baharuddin dan 813 lagi ('pihak menuntut') memeterai satu perjanjian usaha sama dengan Borneo Samudera Sdn Bhd ('BSSB') dan apabila perancangan pihak-pihak tidak berjalan seperti diharapkan, mereka

memutuskan untuk menyelesaikan pertikaian yang timbul melalui timbang tara di Sabah. Semasa timbang tara berjalan, pihak menuntut menghujahkan peguam yang dilantik oleh BSSB perlu mendapat penerimaan masuk *ad hoc* oleh Majlis Peguam Sabah jika dia ingin hadir timbang tara tersebut. Satu permohonan dibuat di Mahkamah Tinggi oleh Mohd Azahari, seorang peguam bela dan peguam cara, bagi pengisytiharan bahawa (i) peguam-peguam luar yang beramal sebagai peguam bela dalam maksud Advocates Ordinance 1953 ('Ordinance') tidak dilarang mewakili pihak-pihak dalam prosiding timbang tara di Sabah; dan (ii) Ordinance tidak terpakai pada prosiding timbang tara di Sabah. Hakim Mahkamah Tinggi memutuskan peguam-peguam luar yang bukan peguam bela dalam maksud Ordinance dilarang mewakili pihak-pihak dalam prosiding timbang tara di Sabah. Mohd Azahari merayu terhadap keputusan Mahkamah Tinggi di Mahkamah Rayuan dan rayuan ini dibenarkan. Mahkamah Rayuan memutuskan peguam bela yang diterima masuk di Sabah tidak mempunyai hak eksklusif mewakili pihak-pihak dalam prosiding timbang tara di Sabah. Maka timbul rayuan-rayuan ini. Isu yang dibangkitkan untuk pertimbangan adalah sama ada s. 8(1) dibaca bersama-sama dengan s. 2(1)(a) dan (b) Ordinance memberi hak eksklusif kepada peguam bela Sabah untuk beramal dengan mewakili atau hadir bagi mana-mana pihak dalam prosiding timbang tara di Sabah walaupun barristers dan solicitors di England tidak mempunyai hak perwakilan eksklusif dalam prosiding timbang tara.

Diputuskan (membenarkan rayuan-rayuan; mengetepikan keputusan Mahkamah Rayuan)
Oleh Hasan Lah HMP menyampaikan penghakiman mahkamah:

(1) Perwakilan pihak-pihak dalam timbang tara di England tidak pernah termasuk dalam bidang eksklusif barristers dan solicitors di England. Seksyen 36 English Arbitration Act 1996 adalah pengkanunan kedudukan common law. Mahkamah Rayuan terkhilaf kerana tidak membaca s. 2(1)(a) dan (b) bersama-sama dengan s. 8(1) Ordinance dan seterusnya mengaitkan hak tidak eksklusif barristers dan solicitors di England untuk hadir bagi pihak-pihak dalam prosiding timbang tara dengan amalan di Sabah kerana wujud peruntukan statutori dalam Ordinance yang menyatakan sebaliknya.

(2) Hak eksklusif beramal di Sabah diberi kepada peguam bela Sabah melalui s. 8(1) Ordinance. Oleh itu, s. 8(1) harus dibaca bersekali dengan s. 2(1)(a) dan (b) Ordinance. Seksyen 2(1)(a) dan (b) tidak membentuk apa-apa hak substantif. Seksyen 2(1)(a) dan (b) hanya mentafsirkan frasa 'to practise in Sabah' dan ini terdapat dalam cabang pertama s. 8(1) Ordinance yang bermaksud menjalankan apa-apa fungsi yang dijalankan oleh barristers dan solicitors di England tanpa mengira sama ada fungsi-fungsi tersebut eksklusif atau tidak eksklusif. Eksklusif atau tidak eksklusif merupakan dua isu berasingan. Eksklusif tidak, dengan sendirinya, membentuk sebahagian fungsi yang perlu dijalankan.

(3) Berdasarkan cabang pertama s. 8(1) Ordinance, peguam bela Sabah mempunyai hak eksklusif untuk mewakili satu pihak dalam prosiding timbang tara di Sabah. Hak statutori yang diberi kepada peguam bela Sabah ini tidak boleh diketepikan dengan sekadar bersandar pada fakta bahawa barristers dan solicitors di England mempunyai hak eksklusif untuk hadir bagi mana-mana pihak dalam prosiding timbang tara, yang sepatutnya membentuk sebahagian fungsi yang termasuk dalam frasa 'to practise in Sabah'. Oleh itu, peguam-peguam luar yang bukan peguam bela bagi maksud Ordinance dilarang daripada mewakili pihak-pihak dalam prosiding timbang tara di Sabah.

Case(s) referred to:

In the Matter of Enactment No. 10 of 1922, The Judgments (Reciprocity) Enactment; Ho Hong Bank Ltd v. Ho Kai Neo & Anor [1932] 1 LNS 24 HC ***(refd)***

Zublin Muhibbah Joint Venture v. Government of Malaysia [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371 HC ***(not foll)***

Legislation referred to:

Advocates Ordinance 1953 (Sabah) (Cap 2), ss. 2(1)(a), (b), 8(1)
Legal Profession Act 1976, ss. 35(1), 36(1)
Procedure Ordinance 1926 (Sabah), ss. 18, 19

Arbitration Act 1996 [UK], s. 36

Other source(s) referred to:

F.A.R. Binnion, *Statutory Interpretation – A Code,* 2nd edn, p 416
Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England,* 1989, 2nd edn, p 303
Redfer & Hunter, *Law and Practice of International Commercial Arbitration,* 2004, 4th edn, pp 317-318

(Civil Appeal No: 02(f)-34-04-2014(S))
For the appellants - Alex Decena, Christina Liew & Sherzali H Asli; M/s CJ Liew & Co
For the respondent - Ho Kin Kong; M/s Ho Chong Yong

(Civil Appeal No: 02(f)-35-04-2014(S))
For the appellants - Stephen Foo, John Sikayun & Gaanesh Nandy; M/s Luping & Co
For the respondent - Ho Kin Kong; M/s Ho Chong Yong

[Editor's note: Appeal from Court of Appeal, Kota Kinabalu; Civil Appeal No: S-02-3304-2010 (overruled).]

Reported by Najib Tamby

JUDGMENT

Hasan Lah FCJ:

Introduction

[1] These are two related appeals before us which were jointly heard as they arose from the same judgment of the Court of Appeal and involved same issue of law. The appeals are against the decision of the Court of Appeal dated 24 September 2012 which allowed the respondent's appeal with costs

by reversing the decision of the High Court given on 26 October 2010. Leave to appeal was granted by this court on 24 March 2014 on the following question of law:

> Whether section 8(1) of the Advocates Ordinance 1953 (Sabah Cap. 2) read together with section 2(1)(a) and (b) thereof confer exclusivity of right to practise by representing and appearing for any party in arbitration proceedings in the State of Sabah to Sabah Advocates notwithstanding that Barristers and Solicitors in England do not have the exclusive right of representation in arbitration proceedings?

[2] The learned High Court Judge held that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 ("Ordinance") are prohibited by the Ordinance from representing parties to arbitration proceedings in Sabah. The Court of Appeal, on the other hand, held that the Sabah advocates have no exclusive right of representation at arbitration proceedings in the State of Sabah.

[3] We heard the appeals on 7 December 2015 and at the conclusion of the hearing, we unanimously allowed the appeals and with the consent of all the parties, no order was made on the costs of the appeals.

[4] We had indicated to the parties that we would give our full written judgment later. We now give our grounds for the decision.

Background Facts

[5] The facts relevant to these appeals are as follows:

The appellants in case No. 34, comprising more than 800 smallholders/claimants to Bagahak Scheme ("claimants") entered into a joint venture agreement with a company known as Borneo Samudera Sdn Bhd ("BSSB").

[6] The claimants had surrendered their respective interests in land lots in the scheme to a joint venture company in exchange for shares in a joint venture company formed under the joint venture agreement.

[7] The shareholders in the joint venture company comprised of the claimants of the one part and BSSB on the other part. Subsequently, a dispute between the parties arose out of the joint venture agreement. Their dispute went for arbitration. The seat of the arbitration was in Sabah.

[8] The claimants were represented by Messrs CJ Liew & Co. Mr Alex Decena acted as counsel for the claimants. BSSB was represented by Messrs Ho Chong Yong. Mr Ho Kin Kong acted as counsel for BSSB. In addition, BSSB had also appointed one Mr Lam Ko Luen, a partner of Messrs Shook Lin & Bok, Kuala Lumpur to act as co-counsel together with Mr Ho Kin Kong.

[9] On or around August 2009, the claimants and BSSB appointed Mr Michael Hwang SC, a Singapore-based chartered arbitrator and lawyer as the sole arbitrator.

[10] During the course of the arbitration, the claimants raised an issue that Mr Lam Ko Luen was required to obtain ad hoc admission to the Sabah Bar if he wished to appear at the arbitration hearing in Kota Kinabalu.

[11] An application was made on 3 September 2010 *vide* originating summons no. K17-29-2010 by the respondent (Mohamed Azahari bin Matiasin), who was practising in the firm of Messrs Ho Chong Yong, for *inter alia* a declaration that foreign lawyers who are not advocates within the meaning of the Ordinance are not prohibited by the Ordinance from representing parties to arbitration proceedings in Sabah and that the Ordinance has no application to arbitration proceedings in Sabah.

[12] The learned High Court Judge held that foreign lawyers who are not advocates within the meaning of the Ordinance are prohibited from representing parties to arbitration proceedings in Sabah. The learned High Court Judge made the following observation:

> Reverting to the issue at hand, I must follow the established rule of interpreting statutes and that is to give the words contained therein their natural meaning and construe that provision in the context of the whole statute. Applying that trite principle to words employed in sec. 8 of Ordinance, I have no hesitation in holding and do hold that the phrase 'exclusive right to practice in Sabah' means that lawyers admitted to the Sabah Bar have the exclusive rights to legal practice in both 'in and outside' courts. In short, if someone who is not a member of the Sabah Bar wishes to carry out works similar to that of an advocate, he must apply for ad hoc admission to the local Bar …

[13] The respondent appealed against the decision of the High Court to the Court of Appeal. On 29 September 2012 the Court of Appeal allowed the appeal. The Court of Appeal held that there was nothing in the Ordinance that stated that advocates admitted in Sabah have the exclusive right to represent parties at arbitration proceedings in the State of Sabah.

Submissions For The President Of The Sabah Law Association

[14] The phrase "to practise in Sabah" is defined in s. 2 of the Ordinance as to perform in Sabah:

> (a) any of the functions which in England may be performed by a member of the Bar as such; or
>
> (b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such;

[15] Section 8(1) of the Ordinance provides that:

> 8(1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah

A subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation:

...

B **[16]** Learned counsel for the President of the Sabah Law Association submitted that s. 2(1)(a) and (b) of the Ordinance is merely a definition provision and it does not create any substantive right. It has to be read with s. 8(1) of the Ordinance which is the very provision conferring exclusive right on Sabah advocates to practise in Sabah. Since appearance in arbitration proceedings is one of the functions performed by English barristers and C solicitors, by virtue of the definition of the expression "to practise in Sabah" it was submitted that to appear in arbitration proceedings in Sabah is "to practise in Sabah". Thus, by virtue of s. 8 of the Ordinance, Sabah advocates have exclusive right to appear in arbitration proceedings as conferred by that section.

D **[17]** Learned counsel for the President of the Sabah Law Association also submitted that English barristers and solicitors have no exclusive right to appear in arbitration proceedings in England by virtue of s. 36 of the UK Arbitration Act 1996 and that provision does not apply to Sabah or Malaysia. There is also no similar provision in our Arbitration Act 2005. It E was therefore submitted that the Court of Appeal erred when it made the following observation in its judgment:

> … We agree with the submission of the appellant that by reason of the definition of the words 'to practise in Sabah' in section 2(1) of the Advocates Ordinance in Sabah, the exclusivity of right to practise for F advocates in Sabah is tied up to the exclusive right of practise of barristers and solicitors in England; and since barristers and solicitors in England have no exclusive right of representation before arbitration proceedings in England, it follows, therefore, that advocates of Sabah also have no exclusive right of representation at arbitration proceedings in the State of Sabah.

G **[18]** It was submitted also that the Court of Appeal erred in adopting a law providing for non-exclusivity in England which had no application in Sabah and applied it to Sabah advocates. The Court of Appeal had erred in applying a provision in the UK Arbitration Act 1996 to override a clear and express provision of s. 8(1) of the Ordinance.

H **[19]** Learned counsel for the President of the Sabah Law Association contended that s. 8(1) of the Ordinance consists of two limbs. The first limb is "to practise in Sabah" and the second limb is "to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah I subordinate thereto which advocates may appear …" Both limbs are preceded by the words "shall have exclusive rights". That means, Sabah advocates shall have "exclusive right to practise in Sabah" as well as

"exclusive right to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah subordinate thereto which advocates may appear…". The Sabah advocates therefore have exclusive right to represent a party in arbitration proceedings in Sabah.

[20] It was further submitted that the Court of Appeal had erred by merely relying on s. 2(1) of the Ordinance, which is a definition section and ignored s. 8(1) of the Ordinance which confers the exclusive right on Sabah advocates to practise in Sabah.

[21] In the circumstances, it was submitted that the question of law posed in these appeals should be answered in the affirmative and the appeals should be allowed.

Submissions For The Claimants

[22] Basically, the submissions of learned counsel for the claimants were similar to the submissions of learned counsel for the President of the Sabah Law Association. Firstly, it was submitted that s. 2(1)(a) and (b) of the Ordinance is a definition provision. It cannot create substantive law. It is used as an aid to interpreting s. 8(1) of the Ordinance, a substantive provision. The court should read the Ordinance as a whole and adopt a purposive interpretation to discover the Legislature's policy or object in enacting the Ordinance. By the purposive approach, the phrase "shall have the exclusive right to practise in Sabah" in s. 8(1) of the Ordinance means that advocates in Sabah "have the exclusive rights to legal practise in both 'in and outside' courts" as held by the High Court Judge.

[23] Secondly, it was submitted that s. 2(1)(a) and (b) of the Ordinance used the word "functions" for barristers and solicitors in England and not the word "practise" as used in s. 8(1) of the Ordinance. But barristers' and solicitors' functions must depend on their right to practise in different areas of laws in England. It is in this sense that the word "functions" in s. 2(1)(a) and (b) of the Ordinance should be understood. It was also submitted that s. 2(1)(a) and (b) of the Ordinance cannot be wholly relied upon to interpret s. 8(1) of the Ordinance because the practise of advocates in Sabah and the functions or practise of barristers and solicitors in England are different.

Submissions Of The Respondent

[24] Firstly, it was submitted that effect has to be given to the special meaning of the phrase "to practise in Sabah" under s. 2(1) of the Ordinance which refers to barristers and solicitors in England who had never enjoyed such exclusivity of practise where arbitration was concerned. This was the position in England before the coming into force of s. 36 of the English Arbitration Act 1996 (see *The Law and Practice of Commercial Arbitration in England*, 2nd edn by Mustill & Boyd (1989) at p. 303).

[25] Secondly, it was submitted that the phrase "exclusive right to practise in Sabah" and the phrase "to appear and plead in the Federal Court …" in s. 8(1) of the Ordinance must be read conjunctively and not disjunctively by virtue of the word "and" therein, in light of accepted principles of statutory interpretation. In support of that, learned counsel cited the case of *In the Matter of Enactment No. 10 of 1922, The Judgments (Reciprocity) Enactment; Ho Hong Bank Ltd v. Ho Kai Neo & Another* [1932] 1 LNS 24; [1932] MLJ 76.

[26] The respondent also relied on the decision of the High Court in *Zublin Muhibbah Joint Venture v. Government of Malaysia* [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371; [1990] 3 MLJ 125 to support his argument that advocates in Sabah did not have exclusive right to appear in arbitration proceedings. In that case, which concerned with arbitration proceedings in West Malaysia, the court was asked to interpret ss. 35(1) and 36(1) of the Legal Profession Act 1976. The court held that in West Malaysia, a person representing a party in an arbitration proceeding need not be an advocate and solicitor within the meaning of the Legal Profession Act 1976; and the Legal Profession Act has no application to an arbitration proceedings in West Malaysia.

[27] Thirdly, it was submitted that the Ordinance was only intended to apply to representations in court and not arbitration. According to learned counsel for the respondent, prior to the unification of the High Court of Sabah and the High Court of Sarawak, the relevant legislation that governed the practice of law in Sabah was, in particular, ss. 18 and 19 of the Procedure Ordinance 1926. As such the Ordinance, which was intended to replace ss. 18 and 19 of the Procedure Ordinance 1926, was therefore intended to apply only to representations in court and not arbitration.

[28] Finally, it was submitted that it was important for the court to take a liberal or purposive approach in deciding the issue or to be in tandem with international practice which allowed parties to be represented by non-lawyers in arbitration.

Decision Of This Court

[29] We would like to touch first on the case of *Zublin Muhibbah* which was relied upon by the respondent to support his argument that the Sabah advocates have no exclusive rights to represent parties in arbitration proceedings in Sabah. The learned High Court Judge held that that case was not applicable to the issue before the court as relevant provisions under the Legal Profession Act 1976 and the Ordinance are different. The Court of Appeal agreed with the High Court. We also agreed with the decisions of the courts below that *Zublin Muhibbah* was not relevant to the issue in this case.

[30] With regard to the position of barristers and solicitors in England, we agreed with learned counsel for the respondent that representation of parties in arbitration in England was never the exclusive domain of barristers and solicitors in England. Section 36 of the English Arbitration Act 1996 was a codification of the common law position (see *Law and Practise of International Commercial Arbitration,* 4th edn, by Redfer & Hunter (2004) at pp. 317-318).

[31] On the construction of ss. 2(1)(a) and (b) and 8(1) of the Ordinance, the High Court Judge *inter alia* ruled that the meaning given to the phrase "to practise in Sabah" under s. 2(1) of the Ordinance had no bearing on the issue before the court because the non-exclusivity of barristers' and solicitors' appearance in arbitration proceedings in England was not relevant to the issue before the court which concerned the exclusivity of legal practise in Sabah.

[32] The Court of Appeal, on the other hand, relied on the definition of the phrase "to practise in Sabah" and ruled that the exclusivity of the right to practise for advocates in Sabah tied up to the exclusivity of the right of practise of barristers and solicitors in England.

[33] Having carefully considered the two provisions under the Ordinance, we agreed with learned counsel for the appellants that since s. 2(1)(a) and (b) is merely a definition provision, it does not create any substantive right. In *Statutory Interpretation – A Code* (2nd edn) by F.A.R. Binnion, at p. 416, the learned author stated as follows:

> Definition with substantive effect. It is a drafting error (less frequent now than formerly) to incorporate a substantive enactment in a definition. A definition is not expected to have operative effect as an independent enactment. If it is worded in that way, the courts will tend to construe it restrictively to confine it to the proper function of a definition.

[34] Under the Ordinance, the exclusive right to practise in Sabah is conferred on Sabah advocates by s. 8(1). As such s. 8(1) has to be read with s. 2(1)(a) and (b) of the Ordinance. As mentioned earlier s. 2(1)(a) and (b) merely defines the phrase "to practise in Sabah" which appears in the first limb of s. 8(1) of the Ordinance to mean to perform any of the functions that may be performed by the barristers and solicitors in England regardless of whether those functions are exclusive or non-exclusive. Exclusivity or non-exclusivity is never part of the definition. Exclusivity and functions are two separate issues. Exclusivity does not in itself form part of the function to be performed.

[35] In our view, by virtue of the first limb of s. 8(1) of the Ordinance, the Sabah advocates have exclusive right to represent a party in arbitration proceedings in Sabah. This statutory right given to the Sabah advocates cannot be taken away by relying merely on the fact that barristers and solicitors in England have non-exclusive right to appear for parties in

A arbitration proceedings, which should form part of the functions included in the expression phrase "to practise in Sabah". We therefore agreed with the conclusion of the High Court Judge that foreign lawyers who are not advocates within the meaning of the Ordinance are prohibited by the same from representing parties to arbitration proceedings in Sabah.

B **[36]** We also agreed with learned counsel for both the appellants that the Court of Appeal had erred by not reading s. 2(1)(a) and (b) of the Ordinance together with s. 8(1) which confers the exclusive right to Sabah advocates to practise in Sabah. The Court of Appeal erred in tying the non-exclusive right of barristers and solicitors in England to appear for parties in arbitration
C proceedings with the practise in Sabah as there is an express statutory provision in the Ordinance to the contrary.

[37] For the reasons given, we answered the question posed in the affirmative. The decision of the Court of Appeal was set aside and the decision of the High Court was reinstated.

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